United Dairy Farmers Cooperative Association *and* Bruce Bach *and* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk and Ice Cream Salesmen, Drivers and Dairy Employees Local Union No. 205. Cases 6-CA-7135, 6-CA-7238, 6-CA-7364, and 6-RC-6682

August 14, 1981

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND ZIMMERMAN

On April 17, 1975, the National Labor Relations Board issued a Decision and Direction[1] in this proceeding. There the Board affirmed Administrative Law Judge Thomas A. Ricci's findings that Respondent had violated Section 8(a)(3) and (1) of the Act by discharging an employee because of his union activity, by discriminatorily attempting to convert its employees to independent contractors, and by discharging six employees who refused such conversion. The Board also affirmed the Administrative Law Judge's findings that Respondent violated Section 8(a)(1) by threatening to close down its plant if its employees chose the Union, by creating the impression of surveillance of its employees' union activities, by coercively interrogating employees concerning their support for the Union, by threatening to discharge employees who supported the Union, and by granting employees a cash bonus for the purpose of deterring their union activities. To remedy the unfair labor practices, the Administrative Law Judge recommended, *inter alia*, that a bargaining order be issued. With respect to the representation case,[2] the Administrative Law Judge recommended sustaining the Union's objections to the election and overruling the challenges to the ballots.

The Board agreed that the challenges should be overruled, but deferred consideration of the remedy until such time as the challenged ballots were opened and counted, since a decision on the appropriateness of a bargaining order would be unnecessary if the revised tally of ballots indicated a union victory. The revised tally indicated that 12 votes had been cast for and 14 against the Union, and the Regional Director then transferred the proceeding to the Board to consider an appropriate remedy.

On June 12, 1979, the Board issued its Decision and Order.[3] In addition to ordering its traditional remedies, the Board provided for various extraordinary remedies,[4] but declined to issue a bargaining order in view of the fact that the Union had at no time been able to obtain authorization cards from a majority of the employees.[5]

Subsequently, both Respondent and the Union filed petitions for review with the United States Court of Appeals for the Third Circuit, and the Board cross-applied to have its Order enforced. On October 30, 1980, the court issued its opinion granting enforcement of the Board's Order.[6] However, the court further held, relying on *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), that the Board possesses the authority to issue a nonmajority bargaining order in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices which have eliminated any reasonable possibility of holding a free and uncoerced election. Noting that the conduct involved herein has been "egregious to the extreme,"[7] the court remanded the case to the Board to make the prerequisite finding as to whether the facts contain the necessary elements warranting the issuance of a *Gissel* bargaining order.

The Board accepted the remand[8] and invited the parties to submit statements of position with re-

[1] The Decision and Direction was not printed in the bound volumes of NLRB Decisions.

[2] The election was held on January 8, 1974. The original tally of ballots indicated that 10 votes were cast for, and 9 against, the Union, with 7 determinative challenged ballots.

[3] 242 NLRB 1026 (1979).

[4] The Board's Order included requirements that Respondent mail the notice to employees and include it in company publications, publish the notice in newspapers, have its president, Hayes, sign all notices and read the notice to employees assembled for that purpose, and afford the Board a reasonable opportunity to have an agent in attendance at such reading. The Board also ordered Respondent to grant the Union reasonable access to bulletin boards and other places where notices are customarily posted, as well as reasonable access to employees in nonwork areas during nonwork time. Respondent was also required to grant the Union the right to deliver a 30-minute preelection speech during worktime, as well as notice of, and equal time and facilities to respond to, any address by Respondent to its employees concerning union representation. The Board made these remedies applicable for 2 years from the date of the posting of the notice, or until the Regional Director issues a certification following an election, whichever comes first. Respondent was also ordered to supply the Union, upon request made within 1 year, with the names and addresses of current employees.

[5] Former Members Murphy and Truesdale, while noting the Board "may" have the authority to issue a bargaining order in the absence of a card majority, nonetheless decided as a matter of policy not to issue a bargaining order under the circumstances of this case. Former Member Penello, concurring and dissenting, concluded that the Board lacked the authority to issue a bargaining order where a union had been unable to obtain a card majority. Chairman Fanning and Member Jenkins, concurring and dissenting, found that the Board possessed the authority to issue such a bargaining order in appropriate circumstances, and further found that a bargaining order was warranted in the circumstances of this case.

[6] 633 F.2d 1054 (1980).

[7] 633 F.2d at 1069.

[8] Chairman Fanning and Member Jenkins adhere to their position, as set forth in the original Decision and Order in this proceeding, that the Board possesses the authority to issue a nonmajority bargaining order. Member Zimmerman respectfully recognizes the Third Circuit's decision as binding upon the Board for the purpose of deciding this case. He therefore finds it unnecessary to determine whether the Board has such authority.

spect to the issues presented. Subsequently, statements of positions were filed by Respondent, the Union, and counsel for the General Counsel.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

At the outset we find it appropriate to review briefly the events in this case in order to obtain an overall perspective on Respondent's conduct. In the fall of 1973,[9] organizing activity was initiated among Respondent's approximately 30 drivers and helpers. Respondent commenced its unlawful activity when its president, Hayes, made plant-closure threats to employee Larry Dahns on November 21 and to employee Larry Thomas sometime in late November. Union activist Bruce Bach was discharged abruptly on November 25, ostensibly because of his involvement in a trucking accident 2 days earlier. The decision to discharge him was made by Respondent's board of directors, which had never before become involved in such matters, and Bach was never asked to give his version of the events. In view of the circumstances, the Board found that the discharge violated Section 8(a)(3) and (1).

Several weeks prior to the election on January 8, 1974, Respondent unlawfully distributed an unprecedented Christmas cash bonus to its employees. Between Christmas and New Year's Day, President Hayes threatened employee Jerry Finley that the farmers would "smash some heads" if the employees selected the Union, and that the farmers would close the plant down and open another plant under a new name. Hayes also made a plant-closure threat to employee Thompson, and he reiterated this threat to employee Larry Thomas on the morning of the election.

Immediately after the election and while the outcome was still in doubt, Supervisor Helen Zitney interrogated employee Melvin Lerch by asking him how he had voted. Supervisor Craig Moore created the impression of surveillance by telling Larry Dahns a few days after the election that Respondent knew that Dahns and his brother were trying to bring in the Union. Moore also violated Section 8(a)(1) one week after the election by asking employee Theodore Fritsch whether he had voted for the Union, and by threatening that Respondent would sell the plant and fire all the drivers who had voted for the Union. Moore later repeated his plant-closure threat to employee Finley and interrogated him as to why he had voted in favor of the Union. Finally, in March 1974, Respondent violated Section 8(a)(3) and (1) by attempting to convert its employees into independent contractors in order to avoid unionization, and by discharging six employees who refused to accept independent contractor status.

In determining the need for a bargaining order, the Board has traditionally measured and weighed, *inter alia*, the quality, severity, reach, repetition, and variety of the unfair labor practices, as well as the existence of a history of misconduct. We note initially that this is not the first occasion on which Respondent has resorted to unlawful tactics in order to thwart union activity among its employees. In a prior case involving employees in its retail stores,[10] Respondent engaged in unlawful interrogations, threatened to fire anyone who signed a union card, warned employees that the stores would be franchised in order to avoid unionization, discharged one employee because of her union activity, and unlawfully changed employees' hours of work. Respondent's history of recidivism reveals its continuing antipathy to its employees' statutory rights, and suggests as well the futility of proceeding to a second election, since there is every reason to believe that Respondent would again flout the Act in order to avoid a union victory.[11]

We also note that Respondent's misconduct was directed toward a relatively small unit of approximately 30 employees. The Board has often observed that the impact of an employer's unfair labor practices is exacerbated in such circumstances,[12] in which a coercive message can be readily disseminated throughout the unit, and where the perpetrator of the message is frequently in close personal contact with employees.

The impact of the unfair labor practices was further aggravated by the swiftness of Respondent's reaction to the union activity.[13] The organizing effort commenced in the fall of 1973, and the Union filed its election petition on November 26. Respondent engaged in several unfair labor practices soon after the onset of union activity, by threatening employee Dahns with plant closure on November 21, and by interrogating employee

[9] Unless otherwise specified all dates herein refer to 1973.

[10] *United Dairy Farmers Cooperative Association*, 194 NLRB 1094 (1972), enfd. *per curiam* 465 F.2d 1401 (3d Cir. 1972). See also *United Dairy Farmers Cooperative Association*, Case 6-CA-4123, which culminated in a court-enforced consent judgment.

[11] Although recidivism is an important element to be weighed, we do not consider it to be a prerequisite to the issuance of a bargaining order. Such a requirement would encourage an employer innocent of prior misconduct to launch an unlawful campaign against union activity, since the employer would be aware that a bargaining order was unavailable to remedy its misconduct.

[12] See, e.g., *Amber Delivery Service, Inc.*, 250 NLRB 63 (1980); *Armcor Industries, Inc.*, 227 NLRB 1543, 1544 (1977).

[13] The Board has often found that the speed of an employer's response to union activity is a factor to be weighed in determining the necessity of a bargaining order. See *Amber Delivery Service, Inc., supra; Wright Plastic Products, Inc.*, 247 NLRB 635 (1980).

Larry Thomas and threatening him with plant closure in late November. On the day before the filing of the petition, employee Bach was discharged in violation of Section 8(a)(3) and (1). In view of this decisive response to the organizing campaign, employees could harbor no doubts about either the firmness of Respondent's commitment to its antiunion position or the consequences which would flow from their attempts to exercise their Section 7 rights.

In measuring the quality and severity of the unfair labor practices, we first consider the discriminatory discharges of Bach and the six employees who resisted Respondent's attempt to confer independent contractor status on its employees. It has long been established that the discharge of an employee because of union activity is a serious unfair labor practice which "goes to the very heart of the Act."[14] The discriminatory discharge is an extremely effective method of curtailing incipient union activity, since an employer who resorts to such conduct imparts to its employees the unmistakable message that loss of livelihood is the price to be exacted for the exercise of Section 7 rights. Discharges for union activity invariably create a lasting impact on employees, and the impact is especially severe when a well-known union activist is the victim of the discrimination.[15] Such is the case here with respect to Bach's discharge, since the Administrative Law Judge identified Bach as "one of the principal union activists" in the organizational drive. Moreover, his discharge was otherwise fraught with unusual circumstances, such as the unprecedented involvement of Respondent's board of directors and the fact that the decision was made abruptly without any effort to ascertain Bach's version of the events.

Equally serious were the discharges of the six employees who resisted Respondent's unlawful attempt to impose on its employees a system designed to convert them to independent contractors. The implementation of the system and the related discharges were the culmination of Respondent's unlawful campaign, and constituted a flagrant attempt to deprive its employees completely of the protections of the Act. We note that on past occasions the Board has viewed attempts to convert employees into independent contractors, when coupled with other unfair labor practices, as being of sufficient gravity to warrant the issuance of a bargaining order.[16]

Respondent's persistent threats to close the plant evoke concerns similar to those arising in connection with discriminatory discharges. The Board and the courts have frequently observed that a plant-closure threat constitutes "one of the most potent instruments of employer interference with the right of employees to organize."[17] Indeed, the Supreme Court has cited with approval a study indicating that such threats are not easily remedied and are more effective than other unfair labor practices in destroying election conditions.[18] As is the case with the discriminatory discharge, a plant-closure threat entails a long-term coercive effect since it suggests that employees can exercise their Section 7 rights only at the risk of losing their means of support. In the instant case, Respondent's constant repetition of the threats served to intensify their coercive impact.[19] The threats began in late November, were reiterated periodically up to the election, and were continued even after the balloting had taken place. The coercive effect was further magnified by the fact that on five occasions the threats emanated from Respondent's president, Hayes,[20] and were often uttered at those times when their coercive impact would be the greatest, such as on the morning of the election and soon after the onset of union activity.

In addition to the foregoing extensive unfair labor practices, Respondent also engaged in numerous other independent violations of Section 8(a)(1) during the course of the election campaign and afterwards. Respondent's threats to discharge union supporters and to use physical violence against them were serious violations which further served to impress upon employees the dire consequences which would result from pursuing their statutory rights. Respondent also unlawfully interrogated employees, created the impression of surveillance, and bestowed an unprecedented cash bonus upon employees in order to deter them from their union resolve.

The preceding analysis demonstrates that this case is unquestionably an "exceptional" one involving "outrageous" and "pervasive" unfair labor practices in which the issuance of a bargaining order in the absence of a card majority is warranted. A careful balancing of all the considerations herein indicates that our traditional remedies would be ineffectual in dissipating the coercive effects of

[14] *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

[15] See *Armcor Industries, Inc., supra; Motel 6, Inc.*, 207 NLRB 473 (1973).

[16] *Amber Delivery Service, Inc., supra; U-Tote M of Oklahoma, Inc.*, 172 NLRB 228 (1968); *Tonkin Corp. of California, d/b/a Seven Up Bottling Co. of Sacramento*, 165 NLRB 607 (1967).

[17] *Chemvet Laboratories, Inc.* v. *N.L.R.B.*, 497 F.2d 445, 448 (8th Cir. 1974).

[18] *N.L.R.B.* v. *Gissel Packing Co., Inc., supra* at 611, fn. 31. See also *Armcor Industries, Inc., supra* at 1544, fn. 5.

[19] See *Hedstrom Company, a subsidiary of Brown Group, Inc.*, 235 NLRB 1193, 1195 (1978), where the Board noted that employees were exposed to plant-closure threats throughout the union campaign.

[20] See *Wright Plastic Products, Inc., supra.*

the unfair labor practices,[21] and we find that by its conduct Respondent has completely foreclosed the possibility of a fair election. What sets this particular case apart from "less extraordinary cases," in which we may issue bargaining orders only if a union has obtained a majority showing, is the gravity, extent, timing, and constant repetition of the violations, which occurred against a background of prior serious misconduct. Respondent has made no effort to disguise its contempt for the Section 7 rights of its employees, and it is rare indeed to encounter misconduct more grave than that which has occurred here.

Moreover, in concluding that a bargaining order is warranted, we also note that the risk of imposing a minority union on the employees is greatly decreased in view of the substantial support exhibited by the Union in the election. In spite of Respondent's extensive and egregious unfair labor practices, the Union nonetheless lost the election by a margin of only 14–12. We are thus satisfied that there is a reasonable basis for concluding that the Union would have enjoyed majority support in the absence of the unfair labor practices.[22]

Finally, we note that Respondent commenced its unlawful campaign on November 21 by making a plant-closure threat to employee Larry Dahns. In accordance with our established practice,[23] and in order to prevent any intervening unilateral changes from going unremedied, we shall impose the bargaining obligation on Respondent as of November 21, 1973.

Based on the foregoing, and the entire record in this case, the National Labor Relations Board hereby modifies its Order issued in this proceeding on June 12, 1979, as indicated below.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board modifies its Order issued in this proceeding on June 12, 1979, and hereby orders that the Respondent, United Dairy Farmers Cooperative Association, Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said Order, as so modified:

1. Add to the Order previously issued in this case the following as paragraph 2(a), and reletter the present paragraph 2(a) and the subsequent paragraphs accordingly:

"(a) Recognize and, upon request, bargain collectively and in good faith as of November 21, 1973, with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk and Ice Cream Salesmen, Drivers and Dairy Employees Local Union No. 205, as the exclusive representative of the employees in the bargaining unit described below, with respect to wages, hours and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

> All drivers employed at 1912 Jane Street, Pittsburgh, Pennsylvania, excluding all others, including production employees, office clerical employees, guards, professional employees and supervisors as defined in the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all the parties participated, the National Labor Relations Board has found that we have violated the National Labor Relations Act. We have been ordered to post this notice and to abide by its terms.

WE WILL NOT coercively question our employees concerning their union activities.

WE WILL NOT threaten to discharge employees because of their union activities.

WE WILL NOT threaten to close the plant in order to prevent union activities among our employees.

WE WILL NOT create the impression among the employees that we are surveying their union activities.

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[21] In drawing this conclusion, we are guided in part by the following observations concerning plant closure threats in *General Stencils, Inc.*, 195 NLRB 1109, 1110 (1972):

> Merely requiring the Employer to refrain from repeating such threats will not, of course, erase the threat from the employees' memory. The *impact* of the threat lingers long after the utterances have been abated. Moreover, the standard remedy for less severe violations—the posting of a notice informing employees that the employer will not repeat his unlawful conduct—often prolongs that impact by insuring that each and every employee is reminded that such a threat was made. Aware that the employer has once threatened him with discharge or plant closure, an employee is likely to find little security in a promise that the threat will not be reiterated.

[22] Although we find that the closeness of the election is a factor to be considered in this case, we would not require a close election as a condition of a bargaining order. Such a requirement might encourage an employer to escalate its misconduct in order to achieve an overwhelming election victory and avoid a bargaining order, thereby rewarding those who engage in the greatest misconduct.

[23] See *Beasley Energy, Inc., d/b/a Peaker Run Coal Company, Ohio Division #1*, 228 NLRB 93 (1977). For the reasons expressed in his concurring opinion in that case, Chairman Fanning would make the bargaining order prospective only.

WE WILL NOT give money bonuses in order to discourage self-organizational activities among our employees.

WE WILL NOT discharge or discriminate against any employees for engaging in concerted or union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk and Ice Cream Salesmen, Drivers and Dairy Employees Local Union No. 205, or any other labor organization, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL recognize and, upon request, bargain collectively as of November 21, 1973, with the above-named Union as the exclusive representative of our employees in the unit described below with respect to rates of pay, wages, hours of employment, and other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All drivers employed at 1912 Jane Street, Pittsburgh, Pennsylvania, excluding all others, including production employees, office clerical employees, guards, professional employees and supervisors as defined in the Act.

WE WILL offer Lawrence Dahns, Jerry Finley, Walter Kossel, Melvin Lerch, Michael Peden, Larry Thomas, and Bruce Bach immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions.

WE WILL pay each of these seven employees for any earnings they lost as a result of our discrimination against them, plus interest.

WE WILL cancel all arrangements made with our former employees on April 1, 1974, and thereafter, whereby they have been working as ostensible contract haulers or piece-work drivers, and WE WILL resume, as to each of these employees, our former method of direct, hourly rated employment to utilize their services.

WE WILL make whole all of our employees for any loss of earnings, direct or indirect, they may have suffered as a result of the changed system of employment we imposed upon them on April 1, 1974, plus interest.

WE WILL send all our employees copies of this notice; WE WILL read this notice to all our employees; and WE WILL publish copies of this notice in local newspapers.

WE WILL, upon request of the Union made within 1 year of the Board's Decision and Order, make available to the Union a list of names and addresses of all our employees currently employed.

WE WILL, immediately upon request of the Union, grant the Union and its representatives reasonable access to our bulletin boards and all places where notices to employees are customarily posted.

WE WILL, immediately upon request of the Union, grant the Union and its representatives reasonable access to our plant in nonwork areas during employees' nonwork time in order that the Union may present its views on unionization to employees, orally and in writing, in such areas during changes of shift, breaks, mealtimes, or other nonwork periods.

WE WILL, if we gather together any group of our employees on worktime at our plant and speak to them on the question of union representation, give the Union reasonable notice and give two union representatives a reasonable opportunity to be present at such speech and, upon request, give one of them equal time and facilities also to speak to you on the question of union representation.

WE WILL, in any election which the Board may schedule at our plant and in which the Union is a participant, permit, upon request by the Union, at least two union representatives reasonable access to the plant and appropriate facilities to speak to you for 30 minutes on working time, not more than 10 working days, but not less than 48 hours, prior to the election.

WE WILL apply the four paragraphs immediately preceding this one for a period of 2 years from the date of this notice, or until the Regional Director of the National Labor Relations Board certifies the results of a fair and free election, whichever comes first.

All our employees have the right to join International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk and Ice Cream Salesmen, Drivers and Dairy Employees Local Union No. 205, or any other labor organization, or to refrain from doing so.

UNITED DAIRY FARMERS COOPERATIVE ASSOCIATION